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15 UNITED STATES BANKRUPTCY COURT
16 EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

17 In re
18 TULARE LOCAL HEALTHCARE
DISTRICT, dba TULARE REGIONAL
19 MEDICAL CENTER,
20 Debtor.
21 Tax ID # 94-6002897
Address: 869 N. Cherry Street
22 Tulare, CA 93274
23 HEALTHCARE CONGLOMERATE
ASSOCIATES, LLC,
24 Plaintiff,
25 v.
26 TULARE LOCAL HEALTHCARE
DISTRICT dba TULARE REGIONAL
27 MEDICAL CENTER,
28 Defendant.

Case No. 17-13797 (Chapter 9)
Adv. Proc. No.: 17-01095-B
DC No.: OHS-3
**TULARE LOCAL HEALTHCARE
DISTRICT DBA TULARE REGIONAL
MEDICAL CENTER’S REQUEST TO
TAKE JUDICIAL NOTICE IN SUPPORT
OF ITS OPPOSITION TO HEALTHCARE
CONGLOMERATE ASSOCIATES, LLC’S
MOTION TO STRIKE PORTIONS OF
ANSWER [ECF 26]**
Date: April 12, 2018
Time: 9:30 a.m.
Dept: Courtroom 13
Judge: Hon. Rene’ Lastreto II

TO THIS COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant Tulare Local Healthcare District (“TLHD”) dba Tulare Regional Medical Center (“TRMC”), pursuant to Rule 201(b)(2) and (d) of the Federal Rules of Evidence, hereby requests that the Court take judicial notice of the following documents, and their contents, submitted in support of *Tulare Local Healthcare District dba Tulare Regional Medical Center’s Opposition to Healthcare Conglomerate Associates, LLC’s Motion to Strike Portions of Answer [ECF 26]* filed concurrently herewith.

“A matter may be judicially noticed if it is either ‘generally known within the trial court’s territorial jurisdiction’ or ‘can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.’” Fed. R. Evid. 201(b). Courts may “take judicial notice of court filings and other matters of public record[, as they] are readily verifiable and therefore, the proper subject of judicial notice.” *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.9 (9th Cir. 2006).

As stated in the concurrently filed *Declaration of Shane G. Smith in Support of Tulare Local Healthcare District dba Tulare Regional Medical Center’s Opposition to Healthcare Conglomerate Associates, LLC’s Motion to Strike Portions of Answer [ECF 26]*, TRMC’s Exhibits “A” – “C” are each authentic, adjudicative matters of public record, and documents or information of which Plaintiff Healthcare Conglomerate Associates, LLC had prior notice for the reasons that follow:

<u>Exhibit</u>	<u>Description</u>	<u>Basis for Authenticity and Public Record Status</u>
A	<u>Order on Plaintiff’s F.R.Civ.P. 12(f) Motion to Strike Affirmative Defenses</u> , filed at ECF 29 in <i>Burton v. Nationstar Mortgage, LLC</i> , No. 1:13-cv-00307-LJO-JLT (E.D. Cal. Sept. 3, 2013).	Order of this court issued on and accessed by counsel for TRMC through the Eastern District of California’s CM/ECF system.
B	<u>Answer to the First Amended Complaint of Defendants-Intervenors Westlands Water District, San Luis Water District, and Panoche Water District</u> , filed at ECF 59 in <i>Pacific Coast Federation of Fisherman’s Assoc. v. U.S. Dept. of the Interior</i> , No. 1:12-cv-01303-LJO-MJS (E.D. Cal.) on April 19, 2013.	Pleading signed by counsel of record for Westlands Water District, San Luis Water District, and Panoche Water District, who are also counsel of record for Plaintiff HCCA here; and filed on and accessed by counsel for TRMC through the Eastern District of California’s CM/ECF system.

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C	<u>Noll Manufacturing Co., N&NW Manufacturing Holding Co., Inc., and the Employee Ownership Holding Company, Inc.’s Answer to Plaintiffs’ Amended Complaint</u> , filed at ECF 245 in <i>Johnson v. Couturier, Jr.</i> , No. 2:05-cv-02046-RRB-KJN (E.D. Cal.) on November 16, 2007.	Pleading signed by counsel of record for Noll Manufacturing Co., N&NW Manufacturing Holding Co., Inc., and the Employee Ownership Holding Company, Inc., who are also counsel of record for Plaintiff HCCA here; and filed on and accessed by counsel for TRMC through the Eastern District of California’s CM/ECF system.
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Dated: March 29, 2018

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

Bv: /s/ Shane G. Smith
Todd A. Wynkoop
Ben T. Nicholson
Shane G. Smith
Vanessa M. Cohn
*Attorneys for Tulare Local Healthcare District dba
Tulare Regional Medical Center*

36894-00000 5057832.1

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DENNIS BURTON, on behalf of
himself and all others similarly
situated,

Plaintiff,

vs.

NATIONSTAR MORTGAGE, LLC.,

Defendants.

CASE NO. CV F 13-0307 LJO GSA

**ORDER ON PLAINTIFF'S F.R.Civ.P. 12(f)
MOTION TO STRIKE AFFIRMATIVE
DEFENSES**
(Doc. 24)

PRELIMINARY STATEMENT TO THE PARTIES AND COUNSEL

Judges in the Eastern District of California carry the heaviest caseload in the nation, and this Court is unable to devote inordinate time and resources to individual cases and matters. This Court cannot address all arguments, evidence and matters raised by parties and addresses only the arguments, evidence and matters necessary to reach the decision in this order given the shortage of district judges and staff. The parties and counsel are encouraged to contact United States Senators Diane Feinstein and Barbara Boxer to address this Court's inability to accommodate the parties and this action. The parties are required to consider, and if necessary, to reconsider consent to one of the Court's U.S. Magistrate Judges to conduct all further proceedings in that the Magistrate Judges' availability is far more realistic and accommodating to parties than that of U.S. District Judge Lawrence J. O'Neill who must prioritize criminal and older civil cases. A Magistrate Judge consent form is available on this Court's website.

1 Judge O'Neill must give criminal cases priority over civil cases and trials and must
2 proceed with criminal trials even if a civil action is older or its trial was set earlier. Civil trials
3 set before Judge O'Neill trail until he becomes available and are subject to suspension mid-trial
4 to accommodate criminal matters. Civil trials are no longer reset to a later date if Judge
5 O'Neill is unavailable on the original date set for trial. If a trial trails, it may proceed with little
6 advance notice, and the parties and counsel may be expected to proceed to trial with less than
7 24 hours notice. Moreover, this Court's Fresno Division randomly and without advance notice
8 reassigns civil actions to U.S. District Judges throughout the nation to serve as visiting judges.
9 In the absence of Magistrate Judge consent, this action is subject to reassignment to a U.S.
10 District Judge from outside the Eastern District of California. Case management difficulties,
11 including trial setting and interruption, are avoided if the parties consent to conduct of further
12 proceedings by a U.S. Magistrate Judge.

13 INTRODUCTION

14 Plaintiff Dennis Burton seeks to strike as insufficiently pled and barred legally
15 defendant Nationstar Mortgage LLC's ("Nationstar's") 20 affirmative defenses in Nationstar's
16 answer to Mr. Burton's First Amended Class Action Complaint for Damages and Injunctive
17 Relief ("FAC"). Nationstar contends that its affirmative defenses are legally sufficient to
18 render Mr. Burton's motion to strike unwarranted and "an unnecessary expenditure of both the
19 parties and the Court's resources." This Court considered Mr. Burton's F.R.Civ.P. 12(f) motion
20 to strike on the record and VACATES the September 5, 2013 hearing, pursuant to Local Rule
21 230(g). For the reasons discussed below, this Court STRIKES 13 affirmative defenses but
22 GRANTS leave to amend them.

23 BACKGROUND

24 Nationstar serviced Mr. Burton's property loan and entered into an agreement with Mr.
25 Burton to modify Mr. Burton's loan under the Home Affordable Modification Program
26 ("HAMP"). Mr. Burton is a current Colorado citizen and formerly resided at the property.
27 Nationstar determined that Mr. Burton's failure to reside on the property rendered the property
28 not owner occupied to invalidate the loan modification. Nationstar foreclosed on the property.

1 The FAC alleges breach of contract and fraud claims that Nationstar wrongfully refused to
2 modify permanently Mr. Burton's and similarly situated borrowers' loans as required under
3 HAMP although Mr. Burton and the other borrowers were qualified and satisfied HAMP
4 requirements for permanent loan modification. The FAC seeks to pursue claims for a proposed
5 class of "all homeowners nationwide who had executed permanent modifications agreements
6 ('PMAs') with Nationstar from January 2008 through the present whose PMAs Nationstar
7 refused to honor by permanently modifying the borrowers' loans."

8 Nationstar's Answer to Burton's First Amended Complaint ("answer") alleges 20
9 affirmative defenses summarized as follows:

10 1. (First) failure to state a cause of action in that the FAC fails to state sufficient
11 facts for a claim;

12 2. (Second) uncertainty in that the FAC fails to describe claims with sufficient
13 certainty;

14 3. (Third) failure to mitigate in that Mr. Burton's damages resulted from his failure
15 to mitigate damages;

16 4. (Fourth) waiver and estoppel in that Mr. Burton's conduct waived his right to
17 seek relief and estopped his recovery;

18 5. (Fifth) laches in that Mr. Burton's claims are barred by the doctrine of laches;

19 6. (Sixth) statute of limitations in that Mr. Burton's claims are barred by
20 limitations periods under California Code of Civil Procedure sections 335.1, 337(1), 338(b),
21 338(d), 339(1) and 343;

22 7. (Seventh) immunity in that Nationstar is immune from Mr. Burton's claims;

23 8. (Eighth) failure to satisfy conditions precedent to bar Mr. Burton's claims;

24 9. (Ninth) unclean hands in that Mr. Burton's claims are barred by the doctrine of
25 unclean hands;

26 10. (Tenth) voluntary payment in that the Mr. Burton voluntarily paid monies he
27 owed to Nationstar;

28 11. (Eleventh) failure to state a punitive damages claim in that the FAC lacks

1 sufficient facts to support punitive damages;

2 12. (Twelfth) procedural due process in that seeking punitive damages violates
3 Nationstar's rights to procedural due process under the Fourteenth Amendment;

4 13. (Thirteenth) consent/ratification in that Mr. Burton consented to Nationstar's
5 conduct and ratified it;

6 14. (Fourteenth) reasonably available alternatives in that Mr. Burton failed to
7 exercise alternatives to avoid alleged damages;

8 15. (Fifteen) accord and satisfaction/novation in that by agreements putative class
9 members waived rights to pursue claims to constitute modification of home loan agreements or
10 novation or an accord and satisfaction of the agreements;

11 16. (Sixteenth) privilege in that Nationwide's good faith assertion of its economic
12 interests is privileged;

13 17. (Seventeenth) comparative fault in that Mr. Burton's recovery is barred or
14 reduced in proportion to his comparative fault;

15 18. (Eighteenth) discharge of obligations in that Nationstar discharged its duties;

16 19. (Nineteenth) compliance with governing law in that Nationstar's compliance
17 with statutes, rules and regulations governing HAMP preclude Nationstar's liability; and

18 20. (Twentieth) no tender that Mr. Burton lacks standing to challenge the property's
19 trustee's sale in the absence of his tender or offer to tender his debt.

20 **DISCUSSION**

21 **F.R.Civ.P. 12(f) Motion To Strike Standards**

22 Mr. Burton seeks to strike all of the answer's affirmative defenses as insufficiently pled
23 and legally barred.

24 F.R.Civ.P. 8(c)(1) addresses affirmative defenses and requires a party responding to a
25 pleading to "affirmatively state any avoidance or affirmative defense." F.R.Civ.P. 12(f)
26 empowers a district court to "strike from a pleading an insufficient defense." "The function of
27 a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from
28 litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v.*

1 *Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993) (quotation marks, citation, and first alteration
2 omitted), *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023,
3 127 L.Ed.2d 455 (1994). A motion to strike is properly granted if it will make trial less
4 complicated or else eliminate delay, serious risks of prejudice to the moving party, or
5 confusion of the issues. *Fantasy, Inc.*, 984 F.2d at 1527.

6 F.R.Civ.P. 8(b)(1)(A) requires a party responding to a pleading to "state in short and
7 plain terms its defenses to each claim asserted against it." An affirmative defense may be
8 stricken as insufficient either as a matter of law or as a matter of pleading. *Kohler v. Islands*
9 *Restaurants, LP*, 280 F.R.D. 560, 564 (S.D. Cal. 2012). Legal insufficiency means that the
10 affirmative defense lacks merit "under any set of facts the defendant might allege." *McArdle v.*
11 *AT & T Mobility LLC*, 657 F.Supp.2d 1140, 1150 (N.D.Cal.2009), *rev'd on other grounds by*
12 *474 Fed. Appx. 515 (2012)*. Pleading insufficiency means a failure to provide the plaintiff with
13 fair notice. *Kohler*, 280 F.R.D. at 565. "Fair notice generally requires that the defendant state
14 the nature and grounds for the affirmative defense." *Kohler*, 280 F.R.D. at 564. In all
15 averments of fraud, including affirmative defenses, the circumstances constituting the fraud
16 must be stated with particularity. *Multimedia Patent Trust v. Microsoft Corp.*, 525 F.Supp.2d
17 1200, 1210-1211 (S.D. Cal. 2007).

18 The defendant bears the burden of proof on an affirmative defense, in the same way
19 that the plaintiff bears the burden of proof on a claim for relief. *See Kanne v. Conn. Gen. Life*
20 *Ins. Co.*, 867 F.2d 489, 492 n. 4 (9th Cir.1988), *cert denied*, 492 U.S. 906, 109 S.Ct. 3216
21 (1989). "If the court determines that an affirmative defense is insufficiently pled, it may strike
22 the defense and require the defendant to file an amended pleading that includes more specific
23 allegations. Leave to amend will be freely granted so long as no prejudice results to the moving
24 party." *Dodson v. Munirs Co.*, 2013 WL 3146818, at 8 (E.D. Cal. 2013).

25 With these standards in mind, this Court turns to Mr. Burton's challenges to the
26 affirmative defenses.

27 Insufficient Pleading

28 Mr. Burton faults all of the answer's affirmative defenses as insufficiently pled under

1 F.R.Civ.P. 8.

2 "Affirmative defenses are pleadings and, therefore, are subject to all pleading
3 requirements of the Federal Rules of Civil Procedure. Thus, defenses must set forth a 'short
4 and plain statement,' Fed.R.Civ.P. 8(a), of the defense." *Heller Financial, Inc. v. Midwhey
5 Power Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir.1989). "The key to determining the sufficiency
6 of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense."
7 *Wyshak v. City National Bank*, 607 F.2d 824, 827 (9th Cir.1979). The "Ninth Circuit has
8 continued to recognize the 'fair notice standard' set forth in *Wyshak*, 607 F.2d at 827, in
9 determining the sufficiency of an affirmative defense." *Pickern v. Chico Steakhouse, LP*, 2013
10 WL 4051640, at *2 (E.D. Cal. 2013) (citing *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011,
11 1023 (9th Cir.2010)). A fellow judge of this Court has explained:

12 . . . as the court recognized in *Kohler*, 280 F.R.D. at 566, the Supreme Court's
13 analysis in *Twombly*, 550 U.S. at 555, and *Iqbal*, 556 U.S. at 679, was limited to
14 pleadings under Federal Rule of Civil Procedure 8(a)(2). Rule 8(a)(2) requires that the
15 party stating a claim for relief provide "a short and plain statement of the claim
16 showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). In contrast, Rule
17 8(c), which governs affirmative defenses, requires only that the responding party
18 "affirmatively state" its affirmative defenses. Fed. R. Civ. P. 8(c). In making this
19 distinction, the *Kohler* court stated that "[f]actual plausibility—which is the key
20 difference between *Twombly/Iqbal* pleading and 'fair notice' pleading—is particularly
21 suited to claim pleading because Rule 8(a)(2) requires that the party 'show[]' that it is
22 entitled to relief." *Kohler*, 280 F.R.D. at 566 (quoting *Iqbal*, 556 U.S. at 679). Thus,
23 "[a]pplying the same standard of pleading to claims and affirmative defenses, despite
24 this clear distinction in the rules' language, would run counter to the Supreme Court's
25 warning in *Twombly* that legislative action, not 'judicial interpretation,' is necessary to
26 'broaden the scope' of specific federal pleading standards." *Id.* (citing 550 U.S. at 569
27 n. 14).

28 *Pickern, LP*, 2013 WL 4051640, at *3

24 An affirmative defense which "simply states a legal conclusion or theory without the
25 support of facts explaining how it connects to the instant case" is insufficient to provide fair
26 notice. *Desert European Motorcars, Ltd. v. Desert European Motorcars, Inc.*, 2011 WL
27 3809933, at *2 (C.D. Cal. 2011). "[B]are bones conclusory allegations" fail to satisfy
28 requirements to plead affirmative defenses. *Heller Financial, Inc. v. Midwhey Powder Co.*,

1 *Inc.*, 883 F.2d 1286, 1295 (7th Cir. 1989). The "burden is on the defendant to proffer sufficient
2 facts and law to support an affirmative defense, and not on the plaintiff to gamble on
3 interpreting an insufficient defense in the manner defendant intended." *CTF Development, Inc.*
4 *v. Penta Hospitality, LLC*, 2009 WL 3517617, at *8 (N.D. Cal. 2009).

5 Mr. Burton characterizes the answer's affirmative defenses as "bare bones" and
6 "formula-like" recitations of legal doctrines without facts to render them insufficient. Mr.
7 Burton particularly faults the (fifteenth) accord and satisfaction/novation defense which
8 although based on waiver, estoppel, modification, novation and accord and satisfaction but
9 fails to plead supporting facts and to provide examples of purported agreements to base the
10 defense.

11 Nationstar urges this Court to apply the "fair notice" standard to its affirmative defenses
12 and argues that its affirmative defenses satisfy such standard. As to the (fifteenth) accord and
13 satisfaction/novation defense, Nationstar contends that it permissibly raises alternative theories
14 to address potential differing agreements between Nationstar and potential class members.

15 This Court agrees with Mr. Burton that the following affirmative defenses are bare
16 bones conclusions lacking facts to connect them to the FAC's claims: (third) failure to
17 mitigate, (fourth) waiver and estoppel, (fifth) laches, (sixth) statute of limitations, (seventh)
18 immunity, (eighth) failure to satisfy conditions, (ninth) unclean hands, (twelfth) procedural due
19 process, (thirteenth) consent/ratification, (fourteen) reasonably available alternatives,
20 (fifteenth) accord and satisfaction/novation, (sixteenth) privilege, and (nineteenth) compliance
21 with government law. These affirmative defenses are merely legal conclusions or theories
22 lacking reference or facts to explain their application to the FAC's claims. As such, they are
23 subject to striking with leave to amend.

24 **Improper Affirmative Defenses**

25 Mr. Burton characterizes as improper the following affirmative defenses: (first) failure
26 to state a claim, (second) uncertainty, (eighth) failure to satisfy conditions precedent, (ninth)
27 unclean hands, (eleventh) failure to state punitive damages, (eighteenth) discharge of
28 obligations, and (nineteenth) compliance with governing law (collectively the "denial

1 defenses"). Mr. Burton reasons that the denial defenses are improper because they attack
2 elements of the FAC's claims and the sufficiency of the FAC's pleading.

3 "The affirmative defense is a descendant of the old plea of 'confession and avoidance,'
4 whereby a defendant admits the plaintiff's prima facie case, and then alleges additional material
5 that defeats the plaintiff's cause of action." *Bd. of Trs. of Leland Stanford Junior Univ. v.*
6 *Roche Molecular Sys., Inc.*, 487 F.Supp.2d 1099, 1112 (N.D. Cal. 2007). Affirmative defenses
7 have thus been defined as "matters extraneous to the plaintiff's prima facie case, which deny
8 plaintiff's right to recover, even if the allegations of the complaint are true." *FDIC v. Main*
9 *Hurdman*, 655 F.Supp. 259, 262 (E.D.Cal.1987).

10 Mr. Burton argues that an affirmative defense which "challenges plaintiff's prima facie
11 case" is improperly raised as an affirmative defense to warrant its striking. *See J & J Sports*
12 *Productions, Inc. v. Gidha*, 2012 WL 537494, at * 2 (E.D. Cal. 2012). Mr. Burton argues that
13 the denial defenses fail to accept the FAC's allegations as true and set forth new matter to
14 justify Nationstar's conduct. Mr. Burton attacks the denial defenses as challenging elements of
15 the FAC's claims "without requiring Nationstar to carry the burden of proof, as required for
16 affirmative defenses."

17 Nationstar responds that a "negative" or denial defense labeled as affirmative is not
18 subject to striking "if no prejudice would result from leaving it in the answer." "Denials that
19 are improperly pled as defenses should not be stricken on that basis alone." *Weddle v. Bayer*
20 *AG Corp.*, 2012 WL 1019824, at *4 (S.D. Cal. 2012). Nationstar points to *Kohler*, 280 F.R.D.
21 at 567, where a fellow district judge observed:

22 Negative defenses may also be raised in [defendant's] answer. *See* Fed.R.Civ.P. 8(b). In
23 fact, Rule 12(b) permits [defendants'] to assert these exact defenses by motion or in the
24 responsive pleading. The Court fails to see how identifying a defense as "affirmative,"
when in actuality it is not, makes that defense legally insufficient.

25 Nationstar concludes that in the absence of prejudice to Mr. Burton, striking the denial
26 defenses will "serve no purpose other than to encourage the filing of other unnecessary motions
27 like this one that compel the expenditure of time and resources litigating irrelevant issues."

28 This Court above addressed the (eighth) failure to satisfy conditions precedent, (ninth)

1 unclean hands, and (nineteenth) compliance with governing law defenses and need not address
2 them again. As to the other denial defenses, Mr. Burton demonstrates no prejudice. Mr.
3 Burton is charged with establishing the FAC's claims. The denial defenses raise grounds
4 which Nationwide may pursue to challenge elements of the FAC's claims. Characterizing the
5 denial defenses as other than affirmative does not support their striking.

6 **Legally Insufficient Defenses**

7 Mr. Burton challenges the (sixth) limitations and (twentieth) no tender defenses as
8 "legally inadequate" in the absence of any set of facts to support them.

9 An "affirmative defense is legally insufficient only if it clearly lacks merit 'under any
10 set of facts the defendant might allege.'" *Kohler*, 280 F.R.D. at 564 (quoting *McArdle*, 657
11 F.Supp.2d at 1149–50). A defense is legally insufficient if in the absence of factual and legal
12 issues, the defense is unable to succeed under any set of circumstances. See *Ganley v. County*
13 *of San Mateo*, 2007 WL 902551, at 1, (N.D. Cal. 2007).

14 **Limitations Defense**

15 Mr. Burton argues that the answer cites no applicable limitations defense in that the
16 cited limitations periods refer to an "action for assault, battery, or injury to, or for the death of,
17 an individual caused by the wrongful act or neglect of another" (Cal. Civ. Code, § 335.1),
18 "damages from any person performing or furnishing the design, specifications, surveying,
19 planning, supervision or observation of construction or construction of an improvement to real
20 property" (Cal. Civ. Code, § 337(1)), and an "action for trespass upon or injury to real
21 property" (Cal. Civ. Code, § 338(b)). Mr. Burton notes that California Civil Procedure section
22 339(1) does not apply because the FAC's claims rest on a fully executed permanent
23 modification agreement, not an oral contract. Mr. Burton continues that California Code of
24 Civil Procedure section 338(d)'s limitations period for fraud or mistake does not apply because
25 the FAC relies on Nationstar's termination letter dated March 7, 2010, which is less than three
26 years prior to the March 4, 2013 filing of this action. Mr. Burton concludes that since this
27 action satisfies a three-year limitations period, it likewise meets the four-year limitations period
28 of California Code of Civil Procedure section 343 for relief not otherwise provided.

Nationstar responds that Mr. Burton seeks resolution of limitations defenses factually

1 and legally, which is unavailable at this pleading stage, especially since the FAC alleges class
2 claims. Nationstar notes that it asserts the four-year limitations period for written agreements
3 under California Civil Code section 337(1), not the four-year limitations period under
4 California Code of Civil Procedure section 337.1, which Mr. Burton confuses. Nationstar
5 points out that the FAC's promissory estoppel claim entitles it to assert the two-year limitations
6 period of California Code of Civil Procedure section 339 for oral contracts. Nationstar further
7 notes that it asserts the two-year limitations period under California Code of Civil Procedure
8 section 335.1 given the FAC's allegations of Mr. Burton's emotional distress damages.

9 As discussed above, without supporting facts, the (sixth) statute of limitations defense
10 is a bare bones legal conclusion. However, contrary to Mr. Burton's contentions, the
11 limitations defense points to applicable limitations periods based on the FAC's claims.
12 Moreover, Mr. Burton, by seeking to strike the limitations defense, seeks resolution of legal
13 and factual issues not available at this pleading stage. Although the limitations defense is
14 insufficient as a matter of pleading, it is not insufficient as a matter of law and is subject to
15 amendment to clear up application of particular limitations periods to the FAC's claims.

16 ***Failure To Tender Indebtedness***

17 Mr. Burton argues that failure to tender indebtedness does not apply in that the FAC's
18 claims are based on the lack of authority to foreclose on the property given that Nationstar was
19 contractually obligated to provide Mr. Burton a permanent loan modification.

20 The tender requirement applies "when there is an alleged irregularity in the notice or
21 procedure of the sale." *Menan v. U.S. Bank Nat'l Assn.*, 2013 WL 595349, at * 7 (E.D. Cal.
22 2013). The tender requirement does not apply when "the foreclosure sale itself was wrongful
23 and should not have occurred at all because defendants were contractually obligated not to
24 conduct the sale." *Menan*, 2013 WL 595349, at * 7. "The law does not require plaintiff to
25 tender the purchase price to a trustee who has no right to sell the property at all." *Menan*, 2013
26 WL 595349, at * 7.

27 Mr. Burton challenges his need to tender because the FAC does not challenge
28 irregularities in the foreclosure proceedings. Mr. Burton contends that in absence of a right to

1 foreclose, he was not required to tender his indebtedness.

2 Nationstar correctly notes that determination whether Mr. Burton has invoked a tender
3 exception is premature. If Nationstar correctly acted, the foreclosure is not void and subject to
4 the tender requirement. The propriety of tender is subject to factual and legal evaluation not
5 available at this pleading stage. Mr. Burton fails to demonstrate that the tender defense lacks
6 merit under any set of facts.

7 **CONCLUSION AND ORDER**

8 For the reasons discussed above, this Court:

9 1. STRIKES as insufficiently pled the (third) failure to mitigate, (fourth) waiver
10 and estoppel, (fifth) laches, (sixth) statute of limitations, (seventh) immunity, (eighth) failure to
11 satisfy conditions precedent, (ninth) unclean hands, (twelfth) procedural due process,
12 (thirteenth) consent/ratification, (fourteenth) reasonably available alternatives, (fifteenth)
13 accord and satisfaction/novation, (sixteenth) privilege, and (nineteenth) compliance with
14 government law defenses but GRANTS Nationstar leave to amend these affirmative defenses
15 to the extent they are supported by fact and law;

16 2. DENIES striking the answer's other affirmative defenses; and

17 3. ORDERS Nationstar, no later than September 20, 2013, to file and serve either:
18 (a) an amended answer; or (b) a statement that it elects to proceed on its answer without
19 amendment and without the stricken affirmative defenses. If Nationstar elects to file an
20 amended answer, Nationstar is admonished to pursue only affirmative defenses based on
21 sufficient supporting facts and law and that this Court will grant Nationstar no further attempt
22 to plead affirmative defenses without a showing of absolute good cause.

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26 IT IS SO ORDERED.

27 Dated: September 3, 2013

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

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EXHIBIT B

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8 San Luis Water District

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA
11 FRESNO DIVISION
12

13 PACIFIC COAST FEDERATION OF
14 FISHERMEN'S ASSOCIATION and SAN
FRANCISCO CRAB BOAT OWNERS
15 ASSOCIATION, INC.,

16 Plaintiffs,

17 v.

18 UNITED STATES DEPARTMENT OF THE
INTERIOR, and UNITED STATES BUREAU
19 OF RECLAMATION,

20 Defendants,

21 WESTLANDS WATER DISTRICT, SAN
LUIS WATER DISTRICT, and PANOCHÉ
22 WATER DISTRICT,

23 Defendants-Intervenors.

Case No. 1:12-cv-01303-LJO-MJS

**ANSWER TO THE FIRST AMENDED
COMPLAINT OF DEFENDANTS-
INTERVENORS WESTLANDS WATER
DISTRICT, SAN LUIS WATER
DISTRICT, AND PANOCHÉ WATER
DISTRICT**

24
25 Defendants-Intervenors Westlands Water District, San Luis Water District and Panoche

26 Water District (collectively "Intervenors") hereby plead and assert defenses to the First Amended

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ANSWER TO 1ST AMENDED COMPLAINT OF
DFTS-INTERVENORS
1:12-cv-01303-LJO-MJS

1 Complaint filed herein as follows.¹ Any allegations, express or implied, that otherwise are not
2 expressly admitted, denied or qualified are hereby denied.

3 1. The allegations of Paragraph 1 contain Plaintiffs' characterization of this action
4 which constitutes conclusions of law to which no response is required but, to the extent a
5 response is deemed to be required, each and every allegation thereof is denied.

6 2. The allegations of the first sentence of Paragraph 2 contain Plaintiffs'
7 characterization of this action which constitutes conclusions of law to which no response is
8 required but, to the extent a response is deemed to be required, each and every allegation thereof
9 is denied. Each and every remaining allegation of Paragraph 2 is denied.

10 3. Each and every allegation of Paragraph 3 is denied.

11 4. Each and every allegation of Paragraph 4 is denied.

12 5. Each and every allegation of Paragraph 5 is denied.

13 6. The allegations of Paragraph 6 contain conclusions of law to which no response is
14 required but, to the extent a response is deemed to be required, each and every allegation thereof
15 is denied.

16 7. In response to Paragraph 7, Intervenor's admit that a substantial part of the
17 preparation of Reclamation's Environmental Assessment and Finding of No Significant Impacts,
18 Three Delta Division and Five San Luis Unit Water Service Renewal Contracts 2012-2014 claims
19 occurred in this judicial district and that the subject interim water service contracts provide for
20 water deliveries to real property within this judicial district. The remaining allegations of
21 Paragraph 7 contain conclusions of law to which no response is required but, to the extent a
22 response is deemed to be required, each and every allegation thereof is denied.

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24 ///

25
26 ¹ By Order dated March 7, 2013, the Court dismissed without leave to amend Plaintiffs' allegation that the no action
27 alternative was unlawful and Plaintiffs' claim that Federal Defendants unlawfully failed to prepare an EIS. The
28 Court did not require the filing of a further amended complaint consistent with that Order. Out of an abundance of
caution and to avoid future disputes, Intervenor's have formally denied herein all charging allegations of the First
Amended Complaint as initially filed.

1 8. The allegations of Paragraph 8 contain conclusions of law to which no response is
2 required but, to the extent a response is deemed to be required, each and every allegation thereof
3 is denied.

4 9. The allegations of Paragraph 9 contain conclusions of law to which no response is
5 required but, to the extent a response is deemed to be required, each and every allegation thereof
6 is denied.

7 10. The allegations of the first sentence of Paragraph 10 contain conclusions of law to
8 which no response is deemed required but, to the extent a response is deemed to be required, each
9 and every allegation thereof is denied. Each and every remaining allegation of paragraph 10 is
10 denied.

11 11. The allegations of Paragraph 11 contain conclusions of law to which no response
12 is required but, to the extent a response is deemed to be required, each and every allegation
13 thereof is denied.

14 12. The allegations of Paragraph 12 contain conclusions of law to which no response
15 is required but, to the extent a response is deemed to be required, each and every allegation
16 thereof is denied.

17 13. Intervenors lack information sufficient to form a belief as to the truth of the
18 allegations contained in the first three sentences of Paragraph 13 and, on that basis, deny each and
19 every allegation thereof. Intervenors deny each and every remaining allegation of Paragraph 13.

20 14. Intervenors lack information sufficient to form a belief as to the truth of the
21 allegations contained in the first four sentences of Paragraph 14 and, on that basis, deny each and
22 every allegation thereof. Intervenors deny each and every remaining allegation of Paragraph 14.

23 15. Intervenors deny each and every allegation of Paragraph 15.

24 16. The first sentence of Paragraph 16 contains conclusions of law to which no
25 response is required but, to the extent a response is deemed to be required, each and every
26 allegation thereof is denied. Intervenors deny each and every remaining allegation of Paragraph
27 16.

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1 17. The first sentence of Paragraph 17 contains conclusions of law to which no
2 response is required but, to the extent a response is deemed to be required, each and every
3 allegation thereof is denied. Intervenor deny each and every remaining allegation of Paragraph
4 17.

5 18. Intervenor admit the allegation of Paragraph 18.

6 19. The first through seventh sentences of Paragraph 19 contain conclusions of law to
7 which no response is required but, to the extent a response is deemed to be required, each and
8 every allegation thereof is denied. Intervenor deny each and every remaining allegation of
9 Paragraph 19.

10 20. Paragraph 20 contains conclusions of law to which no response is required, but to
11 the extent a response is deemed to be required, Intervenor lack information or belief sufficient to
12 admit or deny the allegations of Paragraph 20 and on that basis deny each and every allegation
13 thereof.

14 21. Intervenor lack information or belief sufficient to admit or deny the allegations of
15 the first sentence of Paragraph 21 and on that basis deny each and every allegation thereof. Each
16 and every remaining allegation of Paragraph 21 is denied.

17 22. Each and every allegation of Paragraph 22 is denied.

18 23. The first two sentences of Paragraph 23 contain conclusions of law to which no
19 response is required but, to the extent a response is deemed to be required, each and every
20 allegation thereof is denied. Each and every remaining allegation of Paragraph 23 is denied.

21 24. Paragraph 24 contains conclusions of law to which no response is required but, to
22 the extent a response is deemed to be required, each and every allegation thereof is denied.

23 25. Intervenor admit that Reclamation issued its Environmental Assessment and
24 Finding of No Significant Impacts, Three Delta Division and Five San Luis Unit Water Service
25 Renewal Contracts 2012-2013; approved the eight interim renewal contracts, including contracts
26 with the City of Tracy, Pajaro Valley Water Management Agency, Santa Clara Valley Water
27 District, Westlands Water District , Westlands Water District Distribution District #1 and

28 ///

1 Westlands Water District Distribution District #2; and commenced water delivery pursuant to
2 those contracts. Intervenor deny each and every other allegation of Paragraph 25.

3 26. Each and every allegation of Paragraph 26 is denied.

4 27. Each and every allegation of Paragraph 27 is denied.

5 IV. Section IV, and each unnumbered paragraph thereof, contain conclusions of law to
6 which no response is deemed required but, to the extent a response is deemed to be required, each
7 and every allegation thereof is denied, except that Intervenor admit that Reclamation completed
8 a Programmatic Environmental Impact Statement ("PEIS") in October 1999 and that in
9 September 2005, Reclamation released a draft EIS for long-term renewal for the West San
10 Joaquin and San Luis Unit Contractors.

11 28. Intervenor reallege and reassert their responses to all preceding paragraphs of the
12 First Amended Complaint as if fully set forth herein.

13 29. Paragraph 29 contains conclusions of law to which no response is required but, to
14 the extent a response is deemed to be required, each and every allegation of Paragraph 29 is
15 denied.

16 30. Paragraph 30 contains conclusions of law to which no response is required but, to
17 the extent a response is deemed to be required, each and every allegation of Paragraph 30 is
18 denied.

19 31. Each and every allegation of Paragraph 31 is denied.

20 32. Each and every allegation of Paragraph 32 is denied.

21 33. Each and every allegation of Paragraph 33 is denied.

22 34. Each and every allegation of Paragraph 34 is denied.

23 35. Intervenor reallege and reassert their responses to all preceding paragraphs of the
24 First Amended Complaint as if fully set forth herein.

25 36. Each and every allegation of Paragraph 36 is denied.

26 37. Each and every allegation of Paragraph 37 (Prayer for Relief) is denied and
27 Intervenor allege that Plaintiffs are entitled to no relief whatsoever.

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AFFIRMATIVE AND OTHER DEFENSES

Intervenors allege the following defenses as applicable to any and all of Plaintiffs' claims for relief. Intervenors do not assume the burden of proof on any issues for which the burden of proof is on the Plaintiffs.

1. The Court lacks subject matter jurisdiction over this action.
2. Plaintiffs have failed to state a claim on which relief can be granted.
3. Plaintiffs lack standing to pursue their claims.
4. Plaintiffs' claims are not ripe.
5. Plaintiffs' claims are moot.
6. Plaintiffs have failed to exhaust their administrative remedies.
7. Plaintiffs, by their acts and omissions and otherwise, are estopped from asserting the matters alleged in the First Amended Complaint.
8. Federal law does not authorize a private right of action against Federal Defendants in this matter.
9. Plaintiffs' claims would result in an impairment of Intervenors' contracts.
10. Plaintiffs' claims for relief as pled in the First Amended Complaint are vague and uncertain.
11. Plaintiffs failed to properly join indispensable parties as required under Federal Rules of Civil Procedure Rule 19.
12. Plaintiffs' claims are barred by the doctrine of res judicata.
13. Plaintiffs' claims are barred by the doctrine of collateral estoppel.
14. Plaintiffs' claims are barred by principles of waiver.
15. Plaintiffs' claims are barred under the doctrine of laches as a result of Plaintiffs' failure to seek judicial relief within a reasonable time and such delay has caused detriment and prejudice to Intervenors, Federal Defendants, and the general public.
16. Plaintiffs' claims are barred by applicable statutes of limitations.
17. Intervenors reserve the right to allege additional defenses as they become known, and to amend their Answer accordingly.

WHEREFORE, Intervenor respectfully request that the Court deny all of Plaintiffs' requests for relief, dismiss the First Amended Complaint with prejudice, award Intervenor their costs and attorneys' fees to the extent provided for by law, and grant Intervenor such other relief as the Court deems appropriate.

Dated: April 19, 2013

NORMAN C. HILE
CYNTHIA J. LARSEN
MARTIN RUANO
ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Cynthia J. Larsen

Cynthia J. Larsen
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EXHIBIT C

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 Holding Company, Inc. and The Employee Ownership
 Holding Company, Inc.

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF CALIFORNIA
 SACRAMENTO DIVISION

GREGORY JOHNSON, WILLIAM
 RODWELL, EDWARD RANGEL and
 KELLY MORRELL,

Plaintiffs,

v.

CLAIR R. COUTURIER, JR., DAVID R.
 JOHANSON, ROBERT E. EDDY,
 JOHANSON BERENSON LLP, and
 PENSICO, INC.,

Defendants.

And

THE EMPLOYEE OWNERSHIP HOLDING
 COMPANY, INC. EMPLOYEE STOCK
 OWNERSHIP PLAN, NOLL
 MANUFACTURING COMPANY, N&NW
 MANUFACTURING HOLDING
 COMPANY, INC. AND THE EMPLOYEE
 OWNERSHIP HOLDING COMPANY, INC.

Nominal Defendants.

Case No. 2:05-cv-02046 RRB KJM
 (Lead Case-Consolidated)

**NOLL MANUFACTURING
 COMPANY, N&NW
 MANUFACTURING HOLDING
 COMPANY, INC. AND THE
 EMPLOYEE OWNERSHIP
 HOLDING COMPANY, INC.'S
 ANSWER TO PLAINTIFFS'
 AMENDED COMPLAINT**

1 Nominal defendants Noll Manufacturing Company ("Noll"), N&NW
2 Manufacturing Holding Company, Inc. ("N&NW") and The Employee Ownership Holding
3 Company, Inc. ("TEOHC") (collectively "Nominal Defendants") hereby respond to Plaintiffs'
4 Amended Complaint as follows:

5 1. In response to paragraph 1, Nominal Defendants admit that Plaintiff
6 Gregory Johnson was an employee of Noll. The third sentence of paragraph 1 contains legal
7 conclusions to which no response is required, however, to the extent a response is deemed
8 required, those allegations are denied. The Nominal Defendants deny the remaining allegations
9 in paragraph 1 for lack of sufficient information, knowledge, or belief.

10 2. In response to paragraph 2, Nominal Defendants admit that Plaintiff
11 William Rodwell was an employee of Noll. Nominal Defendants deny the remaining allegations
12 in paragraph 2 for lack of sufficient information, knowledge, or belief.

13 3. In response to paragraph 3, Nominal Defendants admit that Plaintiff
14 Edward Rangel was an employee of Noll. Nominal Defendants deny the remaining allegations in
15 paragraph 3 for lack of sufficient information, knowledge, or belief.

16 4. In response to paragraph 4, Nominal Defendants admit that Plaintiff Kelly
17 Morrell is a participant in the TEOHC ESOP. Nominal Defendants deny the remaining
18 allegations in paragraph 4 for lack of sufficient information, knowledge, or belief.

19 5. In response to paragraph 5, Nominal Defendants admit that Defendant
20 Clair R. Couturier, Jr. was, at times, a member of the Board of Directors of Noll and TEOHC.
21 Nominal Defendants deny the remaining allegations in paragraph 5 for lack of sufficient
22 information, knowledge, or belief.

23 6. In response to paragraph 6, Nominal Defendants admit that David R.
24 Johanson was, at times, the Secretary of Noll and TEOHC and a member of the Noll Board of
25 Directors. The second sentence of paragraph 6 contains legal conclusions to which no response is
26 required, however, to the extent a response is deemed required, those allegations are denied.
27 Nominal Defendants deny the remaining allegations in paragraph 6 for lack of sufficient
28 information, knowledge, or belief.

1 7. In response to paragraph 7, Nominal Defendants admit that Robert E. Eddy
2 has served and continues to serve as a trustee to the ESOP, and as a member of the Board of
3 Directors of TEOHC. Nominal Defendants deny the remaining allegations in paragraph 7 for
4 lack of sufficient information, knowledge, or belief.

5 8. In response to paragraph 8, Nominal Defendants respond that paragraph 8
6 contains legal conclusions to which no response is required, however, to the extent a response is
7 deemed required, those allegations are denied. Nominal Defendants deny the remaining
8 allegations in paragraph 8 for lack of sufficient information, knowledge, or belief.

9 9. In response to paragraph 9, Nominal Defendants respond that paragraph 9
10 contains legal conclusions to which no response is required, however, to the extent a response is
11 deemed required, those allegations are denied. Nominal Defendants deny the remaining
12 allegations in paragraph 8 for lack of sufficient information, knowledge, or belief.

13 10. In response to paragraph 10, Nominal Defendants respond that paragraph
14 10 contains legal conclusions to which no response is required, however, to the extent a response
15 is deemed required, those allegations are denied. Nominal Defendants deny the remaining
16 allegations in paragraph 8 for lack of sufficient information, knowledge, or belief.

17 11. In response to paragraph 11, Nominal Defendants respond that paragraph
18 11 contains legal conclusions to which no response is required, however, to the extent a response
19 is deemed required, those allegations are denied. Nominal Defendants deny the remaining
20 allegations in paragraph 11 for lack of sufficient information, knowledge, or belief.

21 12. In response to paragraph 12, Nominal Defendants respond that paragraph
22 12 contains legal conclusions to which no response is required, however, to the extent a response
23 is deemed required, those allegations are denied. Nominal Defendants deny the remaining
24 allegations in paragraph 12 for lack of sufficient information, knowledge, or belief.

25 13. In response to paragraph 13, Nominal Defendants admit that TEOHC is a
26 Delaware corporation headquartered in California. Paragraph 13 contains legal conclusions to
27 which no response is required, however, to the extent a response is deemed required, those

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1 allegations are denied. Nominal Defendants deny the remaining allegations in paragraph 13 for
2 lack of sufficient information, knowledge, or belief.

3 14. The allegations contained in paragraphs 14 through 19 contain Plaintiffs'
4 jurisdictional and venue allegations which are legal conclusions to which no response is required,
5 however, to the extent a response is deemed required, the allegations of paragraphs 14, 15, 16, 17,
6 18 and 19 are denied.

7 15. In response to paragraph 20, the Nominal Defendants admit the allegations
8 of the first sentence of paragraph 20. Nominal Defendants deny the remaining allegations in
9 paragraph 20 for lack of sufficient information, knowledge, or belief.

10 16. In response to paragraph 21, Nominal Defendants respond that paragraph
11 21 contains legal conclusions to which no response is required, however, to the extent a response
12 is deemed required, those allegations are denied. Nominal Defendants deny the remaining
13 allegations in paragraph 21 for lack of sufficient information, knowledge, or belief.

14 17. In response to paragraph 22, Nominal Defendants respond that paragraph
15 22 contains legal conclusions to which no response is required, however, to the extent a response
16 is deemed required, those allegations are denied. Nominal Defendants deny the remaining
17 allegations in paragraph 22 for lack of sufficient information, knowledge, or belief.

18 18. In response to paragraph 23, Nominal Defendants admit that Robert E. Noll
19 died and the Robert E. Noll Trust became the successor to certain of his shares, that Patricia R.
20 Noll became the controlling shareholder of Noll, and that Barry K. Miller was, at certain points in
21 time, a member of the Noll Board of Directors and company President. Nominal Defendants
22 deny the remaining allegations of paragraph 23 for lack of sufficient information, knowledge, or
23 belief..

24 19. In response to paragraph 24, Nominal Defendants admit that Noll acquired
25 part or all of Northwest Metal Products Company and General Metal Craft Co. Nominal
26 Defendants deny the remaining allegations of paragraph 24 for lack of sufficient information,
27 knowledge, or belief.

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1 20. In response to paragraph 25, Nominal Defendants admit that Couturier was
2 employed by Noll and served as manager for certain of its operations. Nominal Defendants deny
3 the remaining allegations of paragraph 25 for lack of sufficient information, knowledge, or belief.

4 21. In response to paragraph 26, Nominal Defendants admit that Noll
5 maintained a manufacturing facility in Richmond and subsequently maintained a manufacturing
6 facility in Stockton, California. Nominal Defendants deny the remaining allegations of paragraph
7 26 for lack of sufficient information, knowledge, or belief.

8 22. In response to paragraph 27, Nominal Defendants deny the allegations of
9 paragraph 27 for lack of sufficient information, knowledge, or belief.

10 23. In response to paragraph 28, Nominal Defendants deny the allegations of
11 paragraph 28 for lack of sufficient information, knowledge, or belief.

12 24. In response to paragraph 29, Nominal Defendants deny the allegations of
13 paragraph 29 for lack of sufficient information, knowledge, or belief.

14 25. In response to paragraph 30, Nominal Defendants respond that paragraph
15 30 contains legal conclusions to which no response is required, however, to the extent a response
16 is deemed required, those allegations are denied. Nominal Defendants deny the remaining
17 allegations in paragraph 30 for lack of sufficient information, knowledge, or belief.

18 26. In response to paragraph 31, Nominal Defendants deny the allegations of
19 paragraph 31 for lack of sufficient information, knowledge, or belief.

20 27. In response to paragraph 32, Nominal Defendants deny the allegations of
21 paragraph 32 for lack of sufficient information, knowledge, or belief.

22 28. In response to paragraph 33, Nominal Defendants admit that at some time
23 in 2001, Patricia R. Noll, Thomas J. McIntosh and Couturier were on the board of directors for
24 Noll. Nominal Defendants deny the remaining allegations of paragraph 33 for lack of sufficient
25 information, knowledge, or belief.

26 29. In response to paragraphs 34 through 37, Nominal Defendants deny the
27 allegations of paragraphs 34, 35, 36 and 37 for lack of sufficient information, knowledge, or
28 belief.

1 30. In response to paragraph 38, Nominal Defendants deny the allegations of
2 paragraph 38 for lack of sufficient information, knowledge, or belief.

3 31. In response to paragraph 39, Nominal Defendants deny the allegations of
4 paragraph 39 for lack of sufficient information, knowledge, or belief.

5 32. In response to paragraph 40, Nominal Defendants deny the allegations of
6 paragraph 40 for lack of sufficient information, knowledge, or belief.

7 33. In response to paragraph 41, Nominal Defendants deny the allegations of
8 paragraph 41 for lack of sufficient information, knowledge, or belief.

9 34. In response to paragraph 42, Nominal Defendants respond that paragraph
10 42 contains legal conclusions to which no response is required, however, to the extent a response
11 is deemed required, those allegations are denied. The allegations of paragraph 42 are denied for
12 lack of sufficient information, knowledge, or belief.

13 35. In response to paragraph 43, Nominal Defendants deny the allegations of
14 paragraph 43 for lack of sufficient information, knowledge, or belief.

15 36. In response to paragraph 44, Nominal Defendants admit that at some point
16 in 2001, Johanson was legal counsel for the ESOP; McIntosh was legal counsel for Noll, Patricia
17 R. Noll, The Noll Foundation, Inc. and the Robert E. Noll Trust; Mrs. Noll resigned from the
18 board of directors; the board was composed of Couturier, Johanson and McIntosh; and McIntosh
19 resigned as Secretary and legal counsel for Noll. Nominal Defendants deny the remaining
20 allegations of paragraph 44 for lack of sufficient information, knowledge, or belief.

21 37. In response to paragraph 45, Nominal Defendants deny the allegations of
22 paragraph 45 for lack of sufficient information, knowledge, or belief.

23 38. In response to paragraph 46, Nominal Defendants respond that paragraph
24 46 contains legal conclusions to which no response is required, however, to the extent a response
25 is deemed required, those allegations are denied. Nominal Defendants deny the allegations of
26 paragraph 46 for lack of sufficient information, knowledge, or belief.

27 39. In response to paragraph 47, Nominal Defendants respond that paragraph
28 47 contains legal conclusions to which no response is required, however, to the extent a response

1 is deemed required, those allegations are denied. Nominal Defendants deny the allegations of
2 paragraph 47 for lack of sufficient information, knowledge, or belief.

3 40. In response to paragraphs 48 and 49, Nominal Defendants deny the
4 allegations of paragraphs 48 and 49 for lack of sufficient information, knowledge, or belief.

5 41. In response to paragraph 50, Nominal Defendants respond that paragraph
6 50 contains legal conclusions to which no response is required, however, to the extent a response
7 is deemed required, those allegations are denied. Nominal Defendants deny the allegations of
8 paragraph 50 for lack of sufficient information, knowledge, or belief.

9 42. In response to paragraph 51, Nominal Defendants deny the allegations of
10 paragraph 51 for lack of sufficient information, knowledge, or belief.

11 43. In response to paragraphs 52 through 54, Nominal Defendants deny the
12 allegations of paragraphs 52, 53, and 54 for lack of sufficient information, knowledge, or belief.

13 44. Paragraph 55 contains legal conclusions to which no response is required,
14 however, to the extent a response is deemed required, those allegations are denied. Nominal
15 Defendants deny the remaining allegations of paragraph 55 for lack of sufficient information,
16 knowledge, or belief.

17 45. Paragraph 56 contains legal conclusions to which no response is required,
18 however, to the extent a response is deemed required, those allegations are denied. Nominal
19 Defendants deny the remaining allegations of paragraph 56 for lack of sufficient information,
20 knowledge, or belief.

21 46. Paragraph 57 contains legal conclusions to which no response is required,
22 however, to the extent a response is deemed required, those allegations are denied. Nominal
23 Defendants deny the remaining allegations of paragraph 57 for lack of sufficient information,
24 knowledge, or belief.

25 47. In response to paragraph 58, Nominal Defendants deny the allegations of
26 paragraph 58 for lack of sufficient information, knowledge, or belief.

27 48. In response to paragraph 59, Nominal Defendants deny the allegations of
28 paragraph 59 for lack of sufficient information, knowledge, or belief.

1 49. In response to paragraph 60, Nominal Defendants respond that
2 paragraph 60 contains legal conclusions to which no response is required, however, to the extent a
3 response is deemed required, those allegations are denied. Nominal Defendants deny the
4 remaining allegations of paragraph 60 for lack of sufficient information, knowledge or belief.

5 50. In response to paragraph 61, Nominal Defendants respond that
6 paragraph 61 contains legal conclusions to which no response is required, however, to the extent a
7 response is deemed required, those allegations are denied. Nominal Defendants deny the
8 remaining allegations of paragraph 61 for lack of sufficient information, knowledge, or belief.

9 51. In response to paragraph 62, Nominal Defendants respond that
10 paragraph 62 contains legal conclusions to which no response is required, however, to the extent a
11 response is deemed required, those allegations are denied. Nominal Defendants deny the
12 remaining allegations of paragraph 62 for lack of sufficient information, knowledge, or belief.

13 52. In response to paragraph 63, Nominal Defendants deny the allegations of
14 paragraph 63 for lack of sufficient information, knowledge, or belief.

15 53. In response to paragraph 64, Nominal Defendants respond that Couturier's
16 Employment Agreement and its amendments are the best evidence of their contents. The
17 remainder of the allegations in paragraph 64 contains legal conclusions to which no response is
18 required, however, to the extent a response is deemed required, those allegations are denied.
19 Nominal Defendants deny the remaining allegations of paragraph 64 for lack of sufficient
20 information, knowledge, or belief.

21 54. In response to paragraph 65, Nominal Defendants deny the allegations of
22 paragraph 65 for lack of sufficient information, knowledge, or belief.

23 55. In response to paragraph 66, Nominal Defendants deny the allegations of
24 paragraph 66 for lack of sufficient information, knowledge, or belief.

25 56. Paragraph 67 contains legal conclusions to which no response is required,
26 however, to the extent a response is deemed required, those allegations are denied. Nominal
27 Defendants deny the remaining allegations of paragraph 67 for lack of sufficient information,
28 knowledge, or belief.

1 57. Paragraph 68 contains legal conclusions to which no response is required,
2 however, to the extent a response is deemed required, those allegations are denied. Nominal
3 Defendants deny the remaining allegations of paragraph 68 for lack of sufficient information,
4 knowledge, or belief.

5 58. In response to paragraphs 69 through 73, Nominal Defendants deny the
6 allegations of paragraphs 69, 70, 71, 72, and 73 for lack of sufficient information, knowledge, or
7 belief.

8 59. In response to paragraph 74, Nominal Defendants admit that Johanson was
9 counsel for the company for some matters at this time. Nominal Defendants deny the remaining
10 allegations of paragraph 74 for lack of sufficient information, knowledge, or belief.

11 60. In response to paragraph 75, Nominal Defendants deny the allegations of
12 paragraph 75 for lack of sufficient information, knowledge, or belief.

13 61. In response to paragraph 76, Nominal Defendants deny the allegations of
14 paragraph 76 for lack of sufficient information, knowledge, or belief.

15 62. In response to paragraph 77, Nominal Defendants admit they received
16 letters of intent from various entities. Nominal Defendants deny the remainder of the allegations
17 of paragraph 77 for lack of sufficient information, knowledge, or belief.

18 63. Paragraph 78 contains legal conclusions to which no response is required,
19 however, to the extent a response is deemed required, those allegations are denied. Nominal
20 Defendants deny the allegations of paragraph 73 for lack of sufficient information, knowledge, or
21 belief.

22 64. Paragraph 79 contains legal conclusions to which no response is required,
23 however, to the extent a response is deemed required, those allegations are denied. Nominal
24 Defendants deny the allegations of paragraph 79 for lack of sufficient information, knowledge, or
25 belief.

26 65. In response to paragraph 80, Nominal Defendants admit that the Noll
27 Board of Directors retained Eddy as Special Trustee for the Noll ESOP. Nominal Defendants
28 ///

1 deny the remainder of the allegations of paragraph 80 for lack of sufficient information,
2 knowledge, or belief.

3 66. In response to paragraph 81 through 88, Nominal Defendants deny the
4 allegations of paragraphs 81, 82, 83, 84, 85, 86, 87, and 88 for lack of sufficient information,
5 knowledge, or belief.

6 67. In response to paragraph 89, Nominal Defendants admit that Noll
7 purchased the Palm Desert Property. Nominal Defendants deny the remainder of the allegations
8 of paragraph 89 for lack of sufficient information, knowledge, or belief.

9 68. In response to paragraph 90, Nominal Defendants deny the allegations of
10 paragraph 90 for lack of sufficient information, knowledge, or belief.

11 69. In response to paragraph 91, Nominal Defendants admit that TEOHC was
12 incorporated as a Delaware corporation. Nominal Defendants deny the remainder of the
13 allegations of paragraph 91 for lack of sufficient information, knowledge, or belief.

14 70. Nominal Defendants deny the allegations of paragraph 92 for lack of
15 sufficient information, knowledge, or belief..

16 71. In response to paragraph 93, Nominal Defendants responds that the
17 transactions in January 2004 were documented, and that the terms of the documents are the best
18 evidence of their contents. Additionally, paragraph 93 contains legal conclusions to which no
19 response is required, however, to the extent a response is deemed required, those allegations are
20 denied. Nominal Defendants deny the remaining allegations in paragraph 93 for lack of sufficient
21 information, knowledge, or belief.

22 72. In response to paragraph 94, Nominal Defendants respond that paragraph
23 94 contains conclusions of law to which no response is required, however, to the extent a
24 response is deemed required, those allegations are denied. Nominal Defendants deny the
25 remaining allegations in paragraph 94 for lack of sufficient information, knowledge, or belief.

26 73. In response to paragraph 95 through 97, Nominal Defendants deny the
27 allegations in paragraphs 95, 96, and 97 for lack of sufficient information, knowledge, or belief.

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1 74. In response to paragraph 98, Nominal Defendants admit that Eddy was
2 appointed trustee of the TEOHC ESOP in or around June 2004. Nominal Defendants deny the
3 remaining allegations in paragraph 98 for lack of sufficient information, knowledge, or belief..

4 75. In response to paragraph 99, Nominal Defendants deny the allegations in
5 paragraph 99 for lack of sufficient information, knowledge, or belief.

6 76. In response to paragraph 100, Nominal Defendants admit that Roorda
7 resigned as a director of TEOHC. Nominal Defendants deny the remaining allegations in
8 paragraph 100 for lack of sufficient information, knowledge, or belief.

9 77. In response to paragraph 101, the addenda to the letters of intent are the
10 best evidence of their content. Nominal Defendants deny the remaining allegations in paragraph
11 101 for lack of sufficient information, knowledge, or belief.

12 78. In response to paragraph 102, Nominal Defendants deny the allegations in
13 paragraph 102 for lack of sufficient information, knowledge, or belief.

14 79. In response to paragraph 103, Nominal Defendants deny the allegations in
15 paragraph 103 for lack of sufficient information, knowledge, or belief.

16 80. In response to paragraph 104, Nominal Defendants deny the remaining
17 allegations in said paragraph for lack of sufficient information, knowledge, or belief.

18 81. In response to paragraph 105, Nominal Defendants deny the allegations in
19 paragraph 105 for lack of sufficient information, knowledge, or belief.

20 82. In response to paragraph 106, Nominal Defendants deny the allegations of
21 paragraph 106 for lack of sufficient information, knowledge, or belief.

22 83. In response to paragraph 107, Nominal Defendants deny paragraph 107 for
23 lack of sufficient information, knowledge, or belief.

24 84. In response to paragraph 108, Nominal Defendants deny paragraph 108 for
25 lack of sufficient information, knowledge, or belief.

26 85. In response to paragraphs 109 through 114, Nominal Defendants deny
27 paragraphs 109, 110, 111, 112, 113 and 114 for lack of sufficient information, knowledge, or
28 belief.

1 86. In response to paragraph 115, Nominal Defendants deny the allegations of
2 paragraph 115 for lack of sufficient information, knowledge, or belief.

3 87. In response to paragraph 116, Nominal Defendants admit that TEOHC
4 entered into a Loan and Security Agreement with UBOC of California. Nominal Defendants
5 deny the remainder of the allegations for lack of sufficient information, knowledge, or belief.

6 88. In response to paragraphs 117 through 120, Nominal Defendants deny
7 paragraphs 117, 118, 119, and 120 for lack of sufficient information, knowledge, or belief.

8 89. In response to paragraph 121, Nominal Defendants incorporate their
9 responses to paragraphs 1-7, 9-10, 14-17, 19 and 20-120 above as if fully set forth herein.

10 90. In response to paragraphs 122 and 123, the allegations contained in said
11 paragraphs state legal conclusions to which no response is required, however, to the extent a
12 response is required, those allegations are denied. Nominal Defendants deny the remainder of the
13 allegations for lack of sufficient information, knowledge, or belief.

14 91. Nominal Defendants deny paragraph 124 for lack of sufficient
15 information, knowledge, or belief.

16 92. In response to paragraphs 125, 126, 127, 128, 129, 130, 131, 132, 133, 134,
17 135, 136, 137, 138, 139, 140, 141, and 142, the allegations contained in said paragraphs state
18 legal conclusions to which no response is required, however, to the extent a response is required,
19 Nominal Defendants deny the allegations for lack of sufficient information, knowledge, or belief.

20 93. In response to paragraph 143, Nominal Defendants incorporate their
21 responses to paragraphs 1, 5-7, 11-13, 18-19 and 20-120 above as if fully set forth herein.

22 94. In response to paragraphs 144, Nominal Defendants admit that they are
23 named as nominal defendants. Nominal Defendants deny the remaining allegations for lack of
24 sufficient information, knowledge, or belief.

25 95. In response to paragraph 145, the allegations contained in said paragraph
26 145 states legal conclusions to which no response is required. To the extent a response is
27 required, Nominal Defendants deny the remainder of the allegations for lack of sufficient
28 information, knowledge, or belief.

1 96. In response to paragraphs 146, 147, 148, 149, and 150, the allegations
2 contained in said paragraphs state legal conclusions to which no response is required. To the
3 extent a response is required, Nominal Defendants deny the allegations for lack of sufficient
4 information, knowledge, or belief.

5 97. In response to paragraph 151, Nominal Defendants admit that Couturier,
6 Johanson and Eddy were at some time directors of TEOHC. Nominal Defendants deny the
7 remainder of the allegations in paragraph 151 for lack of sufficient information, knowledge, or
8 belief.

9 98. In response to paragraphs 152, 153, 154 and 155, the allegations contained
10 in said paragraphs state legal conclusions to which no response is required, however, to the extent
11 a response is required, those allegations are denied. Nominal Defendants deny the remaining
12 allegations for lack of sufficient information, knowledge, or belief.

13 99. In response to paragraph 156, Nominal Defendants incorporate their
14 responses to paragraphs 1, 6, 8, 11-13, 18-19 and 20-120 above as if fully set forth herein.

15 100. In response to paragraphs 157, Nominal Defendants admit that they are
16 named as nominal defendants. Nominal Defendants deny the allegations for lack of sufficient
17 information, knowledge, or belief.

18 101. In response to paragraphs 158, Nominal Defendants admit that Johanson
19 and JBLLP acted as counsel for Noll, N&NW and TEOHC at some times for some transactions.
20 Nominal Defendants deny the remainder of the allegations for lack of sufficient information,
21 knowledge, or belief.

22 102. In response to paragraphs 159, 160 and 161, the allegations contained in
23 said paragraphs state a legal conclusion to which no response is required, however, to the extent a
24 response is required, those allegations are denied. Nominal Defendants deny the remaining
25 allegations for lack of sufficient information, knowledge, or belief.

26 103. Nominal Defendants deny each and every allegation of Plaintiffs'
27 Amended Complaint not specifically admitted herein.

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AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure To State A Claim)

104. The Amended Complaint fails to state facts sufficient to constitute a claim upon which relief maybe granted against Nominal Defendants.

SECOND AFFIRMATIVE DEFENSE

(Right To Assert Claims)

105. Should it be determined that Plaintiff Kelly Morrell lacks standing to bring the Second and Third Claims for Relief in the Amended Complaint on behalf of Nominal Defendants, Nominal Defendants reserve their right to assert the claims themselves.

THIRD AFFIRMATIVE DEFENSE

(Reservation Of Right To Supplement Affirmative Defenses)

106. Nominal Defendants reserve the right to amend their Answer to the Amended Complaint to assert such additional defenses as may become apparent during the continuing course of discovery in this action.

WHEREFORE, the Nominal Defendants pray for judgment against Plaintiffs as follows:

1. That Plaintiffs take nothing against the Nominal Defendants by reason of their Amended Complaint on file herein;
2. For attorneys' fees and costs of suit; and
3. For such other and further relief as the Court may deem just and proper.

Dated: November 16, 2007

CYNTHIA J. LARSEN
STACY E. DON
ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Cynthia J. Larsen

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15 UNITED STATES BANKRUPTCY COURT

16 EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

17 In re	Case No. 17-13797 (Chapter 9)
18 TULARE LOCAL HEALTHCARE	Adv. Proc. No.: 17-01095-B
19 DISTRICT, dba TULARE REGIONAL	DC No.: OHS-3
20 MEDICAL CENTER,	
21 Debtor.	EXHIBITS TO THE DECLARATION OF
22 Tax ID # 94-6002897	SHANE G. SMITH IN SUPPORT OF
23 Address: 869 N. Cherry Street	TULARE LOCAL HEALTHCARE
24 Tulare, CA 93274	DISTRICT DBA TULARE REGIONAL
25	MEDICAL CENTER'S OPPOSITION TO
26 HEALTHCARE CONGLOMERATE	HEALTHCARE CONGLOMERATE
27 ASSOCIATES, LLC,	ASSOCIATES, LLC'S MOTION TO
28 Plaintiff,	STRIKE PORTIONS OF ANSWER [ECF
v.	26]
29 TULARE LOCAL HEALTHCARE	Date: April 5, 2018
30 DISTRICT dba TULARE REGIONAL	Time: 11:30 a.m.
31 MEDICAL CENTER,	Dept: Courtroom 13
32 Defendant.	Judge: Hon. Rene' Lastreto II

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EXHIBIT	DESCRIPTION	PAGES
A	<u>Order on Plaintiff's F.R. Civ.P. 12(f) Motion to Strike Affirmative Defenses</u> , filed at ECF 29 in <i>Burton v. Nationstar Mortgage, LLC</i> , No. 1:13-cv-00307-LJO-JLT (E.D. Cal. Sept. 3, 2013)	12
B	<u>Answer to the First Amended Complaint of Defendants-Intervenors Westlands Water District, San Luis Water District, and Panoche Water District</u> , filed at ECF 59 in <i>Pacific Coast Federation of Fisherman's Assoc. v. U.S. Dept. of the Interior</i> , No. 1:12-cv-01303-LJO-MJS (E.D. Cal.)	7
C	<u>Noll Manufacturing Co., N&NW Manufacturing Holding Co., Inc., and the Employee Ownership Holding Company, Inc.'s Answer to Plaintiffs' Amended Complaint</u> , filed at ECF 245 in <i>Johnson v. Couturier, Jr.</i> , No. 2:05-cv-02046-RRB-KJN (E.D. Cal.) on November 16, 2007	14

Dated: March 29, 2018

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

By: /s/ Ben Nicholson
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